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IN THE

Supreme Court of the United States

October Term, 1965

NO. 491

C. H. CROSS d/b/a CROSS POULTRY COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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C. H. Cross, d/b/a Cross Poultry Company, the Petitioner herein, prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered in the above case on May 31, 1965.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board issued on September 8, 1964, is reported at 148 NLRB No. 90. (Appendix p. 22). The Opinion of the Court of Appeals for the Fourth Circuit is reported at 346 F. 2d 165 (CCA 4). (Appendix p. 19).

JURISDICTION

The Judgment and Decree of the Court of Appeals for the Fourth Circuit was made and entered on May 31, 1965, and a copy thereof is appended to this Petition in the Appendix at p. 21. Review by the Supreme Court of the United States upon writ of certiorari is sought under the provisions of Section 10 (e) of the Labor Management

Relations Act, 29 U.S.C. § 160 (e), and 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The facts on which the National Labor Relations Board based its assumption of jurisdiction in this case over the Petitioner's business are stipulated. (J.A.[1] pp. 26 and 63; Appendix pp. 48 and 49).

The Petitioner is engaged in the business of producing and selling dressed poultry within the State of North Carolina at wholesale. During the year ending December 31, 1963, the Petitioner sold more than $300,000 worth of dressed poultry at wholesale within North Carolina to another North Carolina wholesaler, North State Provision Company, Inc., which meets the National Labor Relations Board's direct outflow test for determining what businesses "affect" commerce ($50,000 per year sold and shipped outside North Carolina during 1963), and sold more than $50,000 worth of dressed poultry at wholesale within North Carolina to Colonial Stores, Inc., a retail grocery chain store, which does business in several states and meets the National Labor Relations Board's total annual volume of business test for determining what retail enterprises "affect" interstate commerce.[2]

None of Petitioner's poultry was sold outside of North Carolina during the year 1963 and could not be lawfully sold or shipped to another state, because such poultry was not federally inspected. Its sale or shipment in interstate commerce was prohibited by Congress. Poultry Products Inspection Act, 21 U.S.C. § 458(a).[3]

---

1 "J.A." refers to those portions of the record printed in the Joint Appendix.

2 The jurisdictional standards in force during the year 1963 are set out in an excerpt from a speech of the former National Labor Relations Board general counsel. (Appendix, p. 50).

3 § 458. Prohibited act.

The following acts or the causing thereof are prohibited: (a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this chapter.

No evidence was introduced to show how Petitioner's wholly intrastate business of selling poultry at wholesale might "affect" interstate commerce or burden or obstruct interstate commerce or the free flow thereof.

The questions presented are:

1. Did the Circuit Court of Appeals for the Fourth Circuit err in holding that the National Labor Relations Board did have jurisdiction over the Petitioner's intrastate, wholesale poultry business?

2. Did the Circuit Court of Appeals for the Fourth Circuit err in granting enforcement of an order of the National Labor Relations Board without a finding that acts of Petitioner adversely affect, burden or obstruct interstate commerce or tend to adversely affect, burden or obstruct interstate commerce or the free flow thereof?

STATUTES INVOLVED

This case presents for construction by the Supreme Court the provisions of Section 2 (7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152 (7), in the setting of the unique jurisdictional facts involved and pertinent provisions of the Poultry Products Inspection Act, 21 U.S.C. § 453 (a) and 458 (a). (Appendix pp. 52, 53).

STATEMENT

This case arises out of a charge and finding that the Petitioner herein engaged in unfair labor practices under Section 8 (a) (1) and 8 (a) (3) and (1), 29 U. S. C. § 158 (a) (1) and (3). The significant facts giving rise to the jurisdictional questions involved are contained in Section I of the Trial Examiner's Decision (J.A. pp. 2-7; Appendix pp. 25-28). The findings of fact relating to jurisdiction were based on stipulations entered into by the parties. (J.A. pp. 26 and 63; Appendix pp. 48 and 49).

By pleadings, by motions before the Trial Examiner, by appropriate exceptions to the Trial Examiner's Decision, by

briefs filed with the National Labor Relations Board and the Circuit Court of Appeals for the Fourth Circuit, and by oral argument at all stages of the proceeding, the Petitioner has maintained that the National Labor Relations Board exceeded the jurisdiction bestowed upon it by Congress in asserting authority over the business activities of this Petitioner. The motion to dismiss for lack of jurisdiction is alluded to in the Trial Examiner's Decision, *Cross Poultry Co.*, 148 NLRB No. 90, (J.A. p. 3; Appendix p. 22), and the Trial Examiner ruled:

> "Accordingly, I find Respondent is engaged in activities affecting commerce within the meaning of Section 2(7) of the Act and that it would effectuate the policies of the Act to assert jurisdiction and to resolve the substantive issues raised by the complaint." (J.A. p. 7; Appendix p. 28).
>
> "The activities of the Respondent set forth in Section III, above, occurring in connection with the Respondent's operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several States, and, such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes obstructing commerce and the free flow of commerce." (J.A. p. 20; Appendix p. 42).
>
> "Conclusions of Law
>
> "1. Respondent is engaged in activities affecting commerce within the meaning of Section 2(7) of the Act." (J.A. p. 21; Appendix p. 43).
>
> "5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (7) of the Act." (J.A. p. 22; Appendix p. 43).

The Board considered the entire record and adopted the findings and conclusions of the Trial Examiner. (J.A. p. 1; Appendix p. 22).

Before the Circuit Court of Appeals for the Fourth Circuit the case was reduced to the jurisdictional questions raised. On these questions, the Circuit Court of Appeals deferred to the "experience" of the National Labor Relations Board and concluded:

> "Pursuant to this grant of authority, the Board has determined, in the light of its experience, that non-retail employers who sell over $50,000 worth of goods to buyers engaged directly in interstate commerce are in a position to affect interstate commerce if their operations are interrupted by a labor dispute. *Siemons Mailing Service*, 122 N.L.R.B. 81, 85 (1958). The Board has further ruled that the fact that the goods sold by the employer will never be used by the buyer in interstate commerce is irrelevant. *Southern Dolomite*, 129 N.L.R.B. 1342 (1961)." (Appendix p. 20).

> "Indisputably, large sales to buyers engaged in interstate commerce are within the constitutional reach of Congress. The Board was not in error in finding that respondent's sales to North State Provision and Colonial Stores brought its unfair labor practices within the compass of the Act." (Appendix p. 21).

The Circuit Court of Appeals for the Fourth Circuit then ordered enforcement of the National Labor Relations Board decision and order of September 8, 1964, *N.L.R.B. vs. C. H. Cross d/b/a Cross Poultry Company, Supra.*

REASONS FOR GRANTING THE WRIT

A review on writ of certiorari should be granted in this case for at least two of the reasons for which this Court traditionally permits such reviews. The Circuit Court of Appeals for the Fourth Circuit (1) has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the First Circuit, *N.L.R.B. vs. Benevento*, 297 F. 2d 873 (CCA 1, 1961), and a decision of the Circuit Court of Appeals for the Second Circuit, *N.L.R.B. vs. Reliance Fuel*

Oil Corporation, 297 F. 2d 94 (CCA 2, 1961); and (2) has rendered a decision in conflict with applicable decisions of the Supreme Court, *N.L.R.B. vs. Jones & Laughlin Steel Company,* 301 U. S. 1 (1937); *Consolidated Edison Co. vs. Labor Board,* 305 U. S. 197 (1938), *N.L.R.B. vs. Fainblatt,* 306 U. S. 601 (1939), *Polish National Alliance of the United States of North America vs. National Labor Relations Board,* 322 U. S. 643 (1944), *N.L.R.B. vs. Reliance Fuel Oil Corporation,* 371 U. S. 224 (1953). Rule 19 (1) (b), Rules of the Supreme Court.

1. *The Circuit Court of Appeals for the Fourth Circuit Erred in Holding that the National Labor Relations Board had Jurisdiction over the Petitioner's Intrastate, Wholesale Poultry Business.*

Based on the jurisdictional facts in this case, it is clear that the Petitioner was a poultry processer and wholesaler involved wholly in intrastate commerce. There is nothing in the evidence of the case to suggest that the Petitioner had any direct inflow or outflow of goods in commerce or had any indirect inflow or outflow of goods in commerce. The N.L.R.B. did not rule that the Petitioner was in "commerce", as that term is defined in Section 2 (6) of the National Labor Relations Act, 29 U. S. C. § 152 (6). (Appendix p. 53). The Petitioner, as the record shows, could not possibly have had any direct outflow or indirect outflow of goods in interstate commerce without violating the federal poultry inspection laws. The purchasers of Petitioner's products could not lawfully place them in interstate commerce without violating the same federal laws, because Congress has prohibited the movement of poultry which has not been federally inspected in interstate commerce. Poultry Products Inspection Act, 21 U. S. C. § 458 (a). For the purpose of the correct application of the federal poultry inspection laws, Congress defined the term "commerce" in words very similar to those employed in the National Labor Relations Act. 21 U. S. C. § 453 (a) (Appendix p. 52). The Petitioner in this case

could not possibly be engaged in interstate commerce by virtue of his poultry sales.

The Court below based its decision on authority not in point and on an incorrect interpretation of four decisions of significance. The Court of Appeals below cited *Siemons Mailing Service,* 122 N.L.R.B. 81 (1958) as authority for holding that the N.L.R.B. had jurisdiction in the instant case. The Siemons case involved an employer who conducted a mailing service. Of $240,000 in gross receipts for the year 1957, $77,000 was received for mailings outside of the state in which it was located. The Board applied its "indirect outflow standard" in finding that it had jurisdiction. No such facts are involved in the Petitioner's case.

In *Southern Dolomite,* 129 N.L.R.B. 1342 (1961), relied upon by the Court of Appeals below, the employer during the year 1959 sold dolomite limestone in Florida worth in excess of $500,000 to fertilizer manufacturers and fruit and vegetable growers. The fertilizer companies were in interstate commerce by reason of purchases of materials from out of state, and the growers were in interstate commerce by reason of sales of fruit and vegetables outside of the state. At page 1345, the Board concluded that Southern Dolomite was engaged "in commerce", within the meaning of Section 2 (6) of the National Labor Relations Act. No such facts are involved in the Petitioner's case. There is no flow of materials to or from another state involved, and the N.L.R.B. has conceded that this Petitioner is not "in commerce".

The Court below cited *Consolidated Edison Company vs. Labor Board, supra,* in support of a statement that purely intrastate commerce may affect interstate commerce. In the cited case, the employer was a New York electrical firm of great magnitude, which made large purchases of coal and oil from out of state and supplied electric energy to several interstate railroads, the Port of New York Authority, piers of trans-Atlantic steamship companies, telephone and telegraph companies transmitting and receiving interstate mes-

sages, in addition to other purchasers of national concern, such as the United States Custom House. It is obvious that the Petitioner's activities are not such as may be equated with the activities of a large New York City public utility such as Consolidated Edison Company.

The Court below also cited *United States vs. Wrightwood Dairy Company,* 315 U. S. 110 (1942) in support of the proposition that purely intrastate business may affect interstate commerce, but that case involved federal control of milk prices in the Chicago marketing area under a national scheme to protect milk producers, and it was clearly shown by the evidence in that case that control in price on intrastate sales was necessary to promote the protection of interstate commerce. The Petitioner in this case has not been shown to be involved in such a large volume of poultry business as to affect the national interest, and the *United States vs. Wrightwood Dairy Company* decision should not be compelling authority in the instant case.

The Circuit Court of Appeals below misconstrued the meaning of the Supreme Court's decision in *N.L.R.B. vs. Reliance Fuel Oil Corp., supra.* The Court below interpreted the decision in that case to require the application of a judicial stamp of approval to jurisdictional findings of the National Labor Relations Board. In fact, the per curiam decision of this Court in that case merely affirmed jurisdictional findings of the N.L.R.B. below and reversed a decision of the Court of Appeals for the Second Circuit remanding the case to the N.L.R.B. for further findings. The facts on which the N.L.R.B. asserted jurisdiction in the Reliance case showed (1) that Reliance purchased more than $500,000 worth of oil and related products in one year from Gulf Oil Corporation, (2) that these products had been refined in another state and moved into New York, (3) that Reliance met the Board's current standard for asserting statutory jurisdiction over a retail enterprise, in that its gross annual volume of retail sales exceeded $500,000, (4) that there was "legal" jurisdiction, in addition to the gross volume test

being met, because Reliance purchased a substantial amount of its products from a corporation engaged in interstate commerce having gross sales in excess of $3,000,000,000 annually. This Court, in reviewing the decision of the Circuit Court of Appeals for the Second Circuit, observed that Reliance met the Board's self-imposed standards for the exercise of jurisdiction in the case of a "retail" concern and that "most of the products sold to Reliance by Gulf were delivered to Gulf from without the State of New York . . . ", *supra*, p. 225. No such compelling jurisdictional facts as those found in the Reliance case are present in the instant case.

The Court below quoted from *Polish Alliance vs. Labor Board, supra,* broad language indicating the extent of the National Labor Relations Board's jurisdictional powers, but neither the quotation used nor the facts of that case are applicable to this case. The employer in the Polish Alliance case was a fraternal organization with headquarters in Illinois which had 272,897 insurance benefit certificate holders, 76% of which were residents of states other than Illinois. The employer also had field agents in twenty-six states, used interstate communications in the conduct of its insurance activities, and was otherwise engaged in activities over a large part of the United States which clearly affected interstate commerce. There is not the remotest similarity between that case and the Cross Poultry case.

The only case which we can find that is any way similar to the Cross Poultry case is *Frank Smith & Sons,* 111 N.L.R.B. 241 (1955), where the Board asserted jurisdiction over a poultry processer selling $3,500,000 worth of poultry per year inside Texas. Of this amount, $345,000 was sold to Crown Poultry Company, an operating division of Safeway Stores, Inc., which shipped the poultry to its El Paso, Texas, warehouse and commingled it with poultry from other sources. It there lost its identity, and Safeway subsequently shipped more than $900,000 worth of poultry from its El Paso warehouse to stores in Texas and New Mexico. In the

instant case, the purchasers of Petitioner's poultry could not lawfully commingle it with poultry which was to be shipped to another state, because it was not federally inspected, as the poultry involved in the Frank Smith & Sons case must have been.

In the decision below, the Circuit Court of Appeals committed grave error in reciting the facts in the case, when it said:

> "Respondent operates a plant in Raleigh, North Carolina, where he is engaged in the processing of poultry products. . . . Most of the products were sold to two corporations that are engaged directly in interstate commerce." *N.L.R.B. vs. C. H. Cross d/b/a Cross Poultry Company, supra.* (Appendix p. 19).

The truth of the matter is that sales by Petitioner to the two corporations mentioned were a small part of the Petitioner's intrastate business, and the fact of the total volume of Petitioner's business was not even present in the record considered by the court below. Apparently, the Court assumed that the Trial Examiner's finding, that Respondent sold products valued in excess of $500,000 in 1963, represented the approximate gross sales of Petitioner. (J.A. p. 3; Appendix p. 25). It is easy to see how the Court could have arrived at its erroneous conclusion of law by assuming incorrectly that Petitioner's sales to two corporations engaged directly in interstate commerce constituted a major portion of Petitioner's intrastate, wholesale business.

2. *The Circuit Court of Appeals for the Fourth Circuit Erred in Granting Enforcement of an Order of the National Labor Relations Board without a Finding that Acts of Petitioner Adversely Affect, Burden or Obstruct Interstate Commerce or Tend to Adversely Affect, Burden or Obstruct Interstate Commerce or the Free Flow Thereof.*

There was no showing in the case below of a set of facts which indicated that interstate commerce was or might have

been in any way affected, burdened or obstructed or that the free flow thereof was affected adversely by any labor activities at the plant of the Petitioner. In fact, there was no clear showing from the evidence that the business of the Petitioner "affected" commerce in any way at all. The N.L.R.B. merely relied on the application of its own arbitrary jurisdictional rule to the facts established by stipulation. (J.A. p. 26; Appendix p. 48). The Trial Examiner, in finding that there was jurisdiction in the Petitioner's case, relied erroneously on part of the same authority used by the Court below in affirming the Board's decision adopting the findings and conclusions of the Trial Examiner. (J.A. pp. 3-7; Appendix pp. 25-28).

When the matter came on for consideration by the Circuit Court below on the question of jurisdiction only, the Circuit Court of Appeals for the Fourth Circuit, in answering the contention that there was no showing of legal jurisdiction, speaking through Sobeloff, J., said:

> "The respondent's further contention is that the Board is not empowered to rely on general jurisdictional rules but must determine in each case, on the basis of substantial evidence, that commerce has been affected by the activities of the particular employer. This case-by-case approach to jurisdictional questions has been criticized by scholars and rejected by the Supreme Court. In one instance the Second Circuit accepted an argument such as that made by the respondent here and remanded an enforcement proceeding to the Board for a factual determination of how a work stoppage at the employer's place of business would affect commerce. *NLRB v. Reliance Fuel Oil Corp.* 297 F. 2d 94 (2d Cir. 1961). This decision, however, was reversed per curiam by the Supreme Court in *NLRB v. Reliance Fuel Oil Corp.*, 371 U. S. 224 (1963)." *NLRB v. C. H. Cross d/b/a Cross Poultry Company, supra.* (Appendix pp. 20, 21).

We think the court below misunderstood the per curiam

decision rendered by this Court in the Reliance case, *N.L.R.B. vs. Reliance Fuel Oil Corporation, supra.* We understood the decision to mean that the Supreme Court could tell from the evidence in the case that Reliance Fuel Oil Corporation was engaged in business which clearly "affected" commerce, within the meaning of the National Labor Relations Act. The significant part of that decision to us is the conclusion of the Court reading:

> "This being so, the jurisdictional test is met here: the Board properly found that by virtue of Reliance's purchases from Gulf, Reliance's operations and the related unfair labor practices 'affected' commerce, within the meaning of the Act. The judgment of the Court of Appeals accordingly must be and is reversed." *Supra*, p. 227.

We do not understand that the Supreme Court has rejected its long line of authority requiring the National Labor Relations Board and Courts reviewing decisions of the Board to determine from the evidence in the case if there is legal jurisdiction. The decision does not mean to us that Circuit Courts of Appeal must rubber stamp the jurisdictional findings of the National Labor Relations Board. The Supreme Court has not rejected or overruled its long line of scholarly decisions requiring that the evidence and finding of jurisdiction by the Board in each case meet the traditional tests of complying with jurisdictional guides laid down by the Courts.

On the question of reviewing jurisdictional facts and jurisdictional findings, the Supreme Court has previously said:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

N.L.R.B. vs. Jones & Laughlin Steel Corporation, supra, p. 30.

"Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed." *Supra,* p. 32.

"And whether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise." *Consolidated Edison Co. vs. National Labor Relations Board, supra,* p. 222.

"Long before the enactment of the National Labor Relations Act it had been many times held by this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.

"Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers." *National Labor Relations Board vs. Fainblatt, supra,* p. 605.

"This summary of the activities of Alliance and of the methods and facilities for their pursuit amply shows the web of money-making transactions woven across many State lines. An effective strike against such a business enterprise, centered in Chicago, but radiating from it all over the country, would as a practical matter certainly burden and obstruct the means of transmission and communication across these state lines. Stoppage or disruption of the work in Chicago involves interruptions

in the steady stream, into and out of Illinois, of bills, notices, and policies, the payments of commissions, the making of loans on policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio. The effect of such interruptions on commerce is unmistakable. The load of interstate communication and transportation services is lessened, cash necessary for interstate business becomes unavailable, the business, interstate, of newspapers and radio stations suffer. Nor is this all. Alliance, it appears, plays a credit role in interstate industries, railroads, and other public utilities. In 1941, it acquired securities in an amount in excess of $11,000,000, and sold or redeemed securities costing more than $7,500,000. Financial transactions of this magnitude cannot be impeded even temporarily without affecting to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested. That such are the substantial effects on interstate commerce of dislocating labor practices by insurance companies, was established before the Labor Board in at least thirteen comparable situations. The practical justification of such a conclusion has not heretofore been challenged. Considerations like these led the Board to find that petitioner's practices 'have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce', and were therefore 'unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7)', and as such, prohibited by § 10 of the Wagner Act, 29 U.S.C.A. § 160." *Polish National Alliance of United States of North America vs. National Labor Relations Board, supra,* pp. 645-647.

"The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern

technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." *Supra*, p. 650.

We do not understand that the Supreme Court has rejected the above authority by its decision in *N.L.R.B. vs. Reliance Fuel Oil Corporation, supra,* as does the Circuit Court of Appeals for the Fourth Circuit.

The United States Court of Appeals for the Second Circuit, in its Reliance Fuel Oil Corporation decision, cited the Supreme Court decisions mentioned above and concluded " . . . that a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue . . . " and declined to enforce the order of the N.L.R.B. upon the basis of the record before the Court. *N.L.R.B. vs. Reliance Fuel Oil Corporation,* 297 F. 2d. 94, 99 (CCA 2, 1961). The Supreme Court did not reject the authority or the reasoning of the Court of Appeals of the Second Circuit in reversing its decision but merely concluded on the basis of the facts in the record that the N.L.R.B. had properly asserted jurisdiction.

The Court of Appeals for the First Circuit, in *N.L.R.B. vs. Benevento, supra,* relied on the foregoing authority of the Supreme Court requiring a case-by-case examination of jurisdictional facts and concluded "Here we have no such findings. Nor indeed do we have any evidence upon which such findings might be made," *supra,* p. 875. "Clear findings of fact based upon legally sufficient evidence must be made by the Board to support its assertion of jurisdiction", *supra,* p. 876. Surely, this requirement of sufficient evidence to establish jurisdiction is still required upon a judicial review of a decision of the Board. If it is not, then appeal on jurisdictional questions from the Board is meaningless.

Unfortunately, the Circuit Court of Appeals for the Fourth Circuit interprets the decision of this Court in the Reliance Fuel Oil Corporation case as a rejection of the "case-by-case approach to jurisdictional questions", and the Court of Appeals for the First Circuit, since the decision of this Court in the Reliance Fuel Oil Corporation case, has rendered a decision which sounds apologetic for having raised the question of the absence of substantial evidence to show how the employer's business "affected" commerce. *N.L.R.B. vs. Benevento,* 316 F. 2d 224 (CCA 1, 1963).

We think that the Supreme Court has not overruled or rejected its long line of decisions requiring ample evidence and findings based on same in order to support the assertion of jurisdiction. If the decision of the Court of Appeals below in this case is allowed to stand unchallenged, it may well be interpreted to mean that the Appellate Courts need no longer question the findings of the Board but may rely on the experience and wisdom of the Board in making such judicial determinations.

The evidence in this case regarding the jurisdictional questions and the findings based thereon are deficient also in that, if the business of Petitioner affects interstate commerce, there is no showing that the effect on interstate commerce is adverse or burdensome. One would assume from the facts in the case that the intrastate buyers of Petitioner's product would merely find other intrastate suppliers of poultry products if the Petitioner's sales were disrupted by a labor dispute. If otherwise, interstate commerce would be enhanced, rather than being adversely affected, by an increased flow of federally inspected poultry in interstate commerce between new suppliers and two customers of this Petitioner. There is no evidence, no showing, and no proper finding in the decisions below as to how a labor dispute in Petitioner's plant could lead to " . . . burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of com-

merce." Section 2 (7), National Labor Relations Act, *supra.* If such a decision is allowed to stand unchallenged, the commerce clause will have been misconstrued to mean that Congress and the administrative branch of the federal government may regulate commerce " . . . among *and within* the several states . . . ", in excess of powers bestowed by Article I, Section 8, clause (3) of the Constitution of the United States.

CONCLUSION

We respectfully submit that the decision of the court below is in conflict with decisions of other circuit courts, is in conflict with applicable decisions of the Supreme Court, and is based on errors which ought to be corrected by this Court, and we feel certain that this is a proper case for review of the decision below on writ of certiorari. We pray that the writ issue.

Respectfully submitted,

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APPENDIX

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

SOBELOFF, Circuit Judge:

This is a petition by the National Labor Relations Board for the enforcement of its order directing the respondent, Cross Poultry Company, to cease and desist from certain unfair labor practices, to reinstate with back pay three employees and to take other action. Respondent resists on the ground that the Board lacks jurisdiction, claiming that the unfair labor practices were not proved to have affected interstate commerce.

Respondent operates a plant in Raleigh, North Carolina, where he is engaged in the processing of poultry products. During 1963 respondent produced and sold poultry products valued in excess of $500,000. These products, however, could not be shipped across state lines because they were not federally inspected. See 21 U.S.C.A. § 458(a). It is conceded that no poultry products produced by the respondent were sold outside North Carolina during the above period.

Most of the products were sold to two corporations that are engaged directly in interstate commerce. The North State Provision Co., a food wholesaler which does an interstate, as well as intrastate business, purchased over $300,000 worth of respondent's merchandise. Also during this period respondent sold products valued at more than $50,000 to Colonial Stores, Inc., an operator of retail food stores in several states with gross sales in excess of $10,000,000 annually.

Upon the above facts, the Board found that respondent's activities brought it within the jurisdiction of the National Labor Relations Act. Under section 10(a) of that Act the Board is empowered "to prevent any person from engaging in any unfair labor practice affecting commerce." Section 2(7) defines "affecting commerce" to mean:

> "* * * in commerce, or burdening or obstructing commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Pursuant to this grant of authority, the Board has determined, in the light of its experience, that non-retail employers who sell over $50,000 worth of goods to buyers engaged directly in interstate commerce are in a position to affect interstate commerce if their operations are interrupted by a labor dispute. *Siemons Mailing Service,* 122 N.L.R.B. 81, 85 (1958). The Board has further ruled that the fact that the goods sold by the employer will never be used by the buyer in interstate commerce is irrelevant. *Southern Dolomite,* 129 N.L.R.B. 1342 (1961).

The respondent first contends that its operations cannot possibly affect interstate commerce because its products, being uninspected, cannot be moved in such commerce. We cannot agree that an interruption in the supply of an intrastate product could not possibly disrupt a buyer's interstate business with resulting obstruction to interstate commerce. It is well established law that the mere fact that respondent's operations are purely intrastate does not mean that they may not affect interstate commerce. See, *e.g., Edison Co. v. Labor Board,* 305 U.S. 197, 220 (1938); see also *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942).

The respondent's further contention is that the Board is not empowered to rely on general jurisdictional rules but must determine in each case, on the basis of substantial evidence, that commerce has been affected by the activities of the particular employer. This case-by-case approach to jurisdictional questions has been criticized by scholars[1]

[1] See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 64 (1964); Cox, *Federalism in the Law of Labor Relations,* 67 Harv. L. Rev. 1297, 1306 (1954).

and rejected by the Supreme Court. In one instance the Second Circuit accepted an argument such as that made by the respondent here and remanded an enforcement proceeding to the Board for a factual determination of how a work stoppage at the employer's place of business would affect commerce. *NLRB v. Reliance Fuel Oil Corp.*, 297 F.2d 94 (2d Cir. 1961). This decision, however, was reversed per curiam by the Supreme Court in *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963). The Court reminded that it had "consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the commerce clause." *Supra*, at p. 226. The Court then quoted the following language from an earlier decision:

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance v. Labor Board*, 322 U.S. 643, 648 (1944).

Indisputably, large sales to buyers engaged in interstate commerce are within the constitutional reach of Congress. The Board was not in error in finding that respondent's sales to North State Provision and Colonial Stores brought its unfair labor practices within the compass of the Act.

Enforcement granted.

JUDGMENT AND DECREE OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement

of a certain order issued by it against Respondent, C. H. Cross d/b/a Cross Poultry Company, his agents, successors, and assigns on the 8th day of September, 1964, in a proceeding before said Board known upon its records as Case Nos. 11-CA-2274 and 11-CA-2306; upon the answer of said respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby, enforced, and that the said C. H. Cross d/b/a Cross Poultry Company, his agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

FILED
MAY 31, 1965
MAURICE S. DEAN
CLERK

SIMON E. SOBELOFF
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

NLRB DECISION AND ORDER

On June 19, 1964, Trial Examiner Leo F. Lightner issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that he cease and desist therefrom and take certain affirmative action, as set forth in the Decision attached hereto. Thereafter the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof.[1]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

1 Respondent's request for oral argument is denied because in our opinion the record, including the exceptions and brief, adequately sets forth the issues and the positions of the parties.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision and the entire record in the case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Recommendations of the Trial Examiner and orders that C. H. Cross d/b/a Cross Poultry Company, his agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following addition:

The following is added, as Paragraph 2(b), to the Trial Examiner's Recommended Order, and the subsequent paragraphs are renumbered as Paragraphs 2(c), 2(d), and 2(e):

"Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training

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[2] The Respondent operates a poultry processing plant in North Carolina. It is not subject to the Poultry Products Inspection Act, Title 21 U.S. Code Ann. Ch. 10, and its products may therefore not be sold or resold outside of that State. The dollar value of Respondent's sales at wholesale within the State to purchasers who are themselves engaged in commerce was stipulated and clearly justifies the Trial Examiner's holding that Respondent's operations meet the indirect outflow standard of the *Siemons Mailing* case, 122 NLRB 31, and thereby affect commerce. See also *Taylor Baking Company*, 143 NLRB No. 53, and *M. Benevento Sand & Gravel Co.*, 138 NLRB 110. Respondent contends however, that the statutory prohibition against the sale of its poultry outside the State estops the Board from asserting that such sales affect commerce within the meaning of Section 2(7) of the Act. The contention is without merit. Though Respondent's products may never enter the stream of interstate commerce they nevertheless affect such commerce through their competition with Federally inspected poultry which crosses State lines, see *Wickard* v. *Filburn*, 317 U.S. 111, and because a labor dispute at Respondent's plant would tend to burden the operations of its customers who are engaged in commerce by cutting off a source of supply. See *Reliance Fuel Oil Corp.* v. *N.L.R.B.*, 371 U.S. 224.

and Service Act of 1948, as amended, after discharge from the Armed Forces."

Dated, Washington, D. C., September 8, 1964.

FRANK W. MCCULLOCH, Chairman

BOYD LEEDOM, Member

(Seal)

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

Before: *Leo F. Lightner*, Trial Examiner.

NLRB TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE.

This proceeding was heard before the undersigned Trial Examiner in Raleigh, North Carolina, on March 2, 1964, on the consolidated complaint of the General Counsel, as amended, and the answer of C. H. Cross, herein referred to as Respondent, as amended.[1] The issues litigated were whether the Respondent violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Labor-Management Relations Act, 1947, as amended, 61 Stat. 136, herein called the Act. The parties waived oral argument and briefs filed by the General Counsel and Respondent have been carefully considered. During the hearing the Trial Examiner reserved rulings on several motions including Respondent's motions to dismiss the complaint. These motions are disposed of in accordance with Findings and Conclusions herein set forth.

Upon the entire record and from my observation of the witnesses, I make the following:

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[1] The charge in Case No. 11-CA-2274 was filed on October 16, 1963. The charge in Case No. 11-CA-2306 was filed on December 2, 1963. A consolidated complaint was issued on January 31, 1964, and amended, on February 13, 1964.

Findings and Conclusions

I. The Business of the Respondent

Respondent is an individual proprietorship, owning and operating a plant in Raleigh, North Carolina, where it is engaged in the processing of poultry products. During the year ending December 31, 1963, a representative period, Respondent produced, sold and distributed poultry products valued in excess of $500,000.

It is undisputed that during the year ending December 31, 1963, Respondent sold poultry products of a value in excess of $300,000 to North State Provision Company, Inc., at Ahoskie, North Carolina. During the same period Respondent produced and sold poultry products of a value in excess of $50,000 to Colonial Stores, Inc., at its Raleigh, North Carolina, division. North State Provision Company, Inc., is a corporation with its principal office and place of business at Ahoskie, North Carolina, where it is engaged in the wholesale business of distributing and selling beef, veal, pork, poultry and other products. During the same period North State Provision Company, Inc., sold and shipped products of a value in excess of $50,000 from its Ahoskie, North Carolina, place of business to points outside the State of North Carolina. Colonial Stores, Inc., is a Virginia corporation engaged in the operation of market type stores retailing groceries, meat, produce, poultry and other products. It has stores and other facilities in Virginia, North Carolina, and other States. During the year ending December 31, 1963, gross sales of Colonial Stores, Inc., were in excess of $10,000,000, and during the same period of time, its sales through its Raleigh, North Carolina, division facility were in excess of $500,000.

It is undisputed that no poultry produced by Respondent is sold outside the State of North Carolina. It is also undisputed that Respondent had no direct or indirect inflow. General Counsel acknowledges that Respondent is not engaged in commerce within the meaning of Section 2(6) of

the Act but contends that Respondent is engaged in activities "affecting commerce" within the meaning of Section 2(7) of the Act.

Respondent asserts that its products are not federally inspected and that it is prohibited, for that reason, from selling its products beyond the State of North Carolina. Respondent contends that its purchasers are on notice that its poultry cannot be transferred for sale outside the State of North Carolina. Accordingly, Respondent contends that its activities do not have an impact on commerce.

In the *Siemons* case[2] the Board said: . . . it will best effectuate the policies of the Act if jurisdiction is asserted over all nonretail enterprises which have an outflow or inflow across State lines of at least $50,000, whether such outflow or inflow be regarded as direct or indirect. For the purposes of applying this standard, direct outflow refers to goods shipped or services furnished by the employer outside the State. Indirect outflow refers to sales of goods or services to users meeting any of the Board's jurisdictional standards except the indirect outflow or indirect inflow standard.

In the *Catalina Island* case[3] the Board said: Implicit in the Board's promulgation of its jurisdictional standards is the recognition that in ordinary circumstances the meeting of a gross dollar volume test will necessarily entail activities "affecting commerce" within the purview of Section 2(7) of the Act. Nevertheless, the Board recognizes that the Federal Government is a government of limited jurisdiction and that some showing of legal jurisdiction must be made in every case brought before its tribunals, be they Federal district courts, courts of appeal, the Supreme Court, or independent administrative agencies. Neither the *Guss* case *(P. S. Guss, d/b/a Photo Sound Products Manufacturing Company v. Utah Labor Relations Board,* 353 U.S. 1), nor

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2 *Siemons Mailing Service,* 122 NLRB 81, 85.

3 *International Longshoremen & Warehousemen's Union (Catalina Island Sightseeing Lines),* 124 NLRB 813, 814.

any other case, has overturned the basic concepts on which our constitution is predicated. It is possible, although highly improbable that an enterprise meeting the gross dollar standards of the Board would not come within the broad definition of "affecting commerce," even though that term has been judicially determined to indicate an intention on the part of Congress to exercise Federal jurisdiction to the fullest possible extent. For this reason, we agree with the Trial Examiner that the gross dollar volume test, standing alone, is insufficient to confer upon the Board the jurisdiction contemplated by the Act. Some proof must be made of legal jurisdiction.

In the *Southern Dolomite* case[4] the Board noted that the Trial Examiner proceeded on the assumption that under the *Catalina Island* and related cases the gross dollar volume test, standing alone, is insufficient to confer upon the Board jurisdiction contemplated by the Act, and that since no proof of the Board's statutory or legal jurisdiction had been made, the Trial Examiner found that it would not effectuate the policies of the Act to assert jurisdiction. The Board held that jurisdiction, in the instant case, is not asserted on the basis of any standard stated exclusively in terms of gross dollar volume of business. It is asserted on the ground that the operations of the Respondents meet the requirements of the $50,000 indirect outflow-inflow test. The Board stated that it has recognized the inherent distinction between these standards. Under the first standard, the operations of an employer could satisfy the gross dollar volume test, and yet be purely local in character. Hence, some proof of legal or statutory jurisdiction would be necessary. No such situation could conceivably arise where jurisdiction is asserted on the basis of the outflow-inflow test. Under the second standard the very meaning of the standard establishes legal jurisdiction within the meaning of Section 2(6) or (7) of the Act. In establishing this

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[4] *R. E. Smith and Florence B. Smith, a partnership, d/b/a Southern Dolomite, etc.* 129 NLRB 1342.

standard, the Board had already concluded in the light of its experience that when the operations of the employer meet this standard, they substantially affect commerce within the meaning of the Act. Accordingly, the Board requires no further proof of legal or statutory jurisdiction in these cases.

In the *Southern Dolomite* case the Board further said: Nor is it necessary in asserting jurisdiction under the outflow-inflow standard that there be additional evidence that the operations of the employer have a substantial and direct relation to interstate commerce. The Board in establishing this standard has already determined that outflow-inflow which amounts to $50,000, or more has a substantial and direct impact on commerce sufficient to warrant assertion of jurisdiction. Similarly, it is unnecessary in proceeding under this standard to inquire into the nature of goods or services furnished by the employer to its customers and as to whether they are utilized directly or indirectly in the goods or materials crossing State lines. The new standard requires that the employer's product merely be used in the operations of the interstate enterprise. The Board defined the indirect outflow as "sales of goods or services to users meeting any of the Board's jurisdictional standards, except the indirect outflow or indirect inflow standard." Accordingly, we find it immaterial to establish whether or not Dolomite becomes an ingredient in fruits and produce which are shipped out-of-State.[5]

Accordingly, I find Respondent is engaged in activities affecting commerce within the meaning of Section 2(7) of the Act and that it would effectuate the policies of the Act to assert jurisdiction and to resolve the substantive issues raised by the complaint.

II. The Labor Organization Involved

Local 525, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, herein called the Union,

[5] See also *Labor Relations Commission of Massachusetts*, 138 NLRB 381.

is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The Issues

The principal issues raised by the pleadings, as amended, and litigated at the hearing are whether the Respondent: (a) interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1), in October 1963, by interrogation and threats[6]; or, (b) whether the discharges of Nellie Sample, on October 3, 1963, Edith Mitchell, on October 9, 1963, and Glennie Badger Coley, on October 29, 1963, and the failure and refusal to reinstate said employees thereafter, were discriminatorily motivated and were unfair labor practices in violation of Section 8(a)(3) and (1) of the Act. Respondent generally denied the commission of any unfair labor practices. In his answer, Respondent affirmatively asserted that the discharges were for cause, by reason of the employees having violated specified Rules.

Background and Sequence of Events

Except as noted there is no dispute as to the sequence of events herein set forth. The principal events occurred between September 20, 1963, and October 29, 1963. Charles H. Cross, owner and manager, Mrs. Charles Cross, assistant manager, and Jerry Murphy, foreman, are admittedly supervisors within the meaning of Section 2(11) of the Act.

On Friday, September 20, 1963, at the end of a break period, there was a work stoppage at Respondent's plant. It appears that Respondent, at that time, employed between 125 and 150 employees. Several employees estimated the number who engaged in the stoppage as approximating 75 percent. President Cross first testified the number was

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[6] The allegations of paragraph 10(b) relative to interrogation by Foreman Jerry Murphy were withdrawn.

in excess of 60, and later, admitting he might be underestimating, set the figure at 25. It is undisputed that President Cross and Foreman Murphy went out to talk to the group, to inquire as to the reason for their failure to return to work. Nellie Sample[7] credibly testified that she advised Cross that the employees desired a 15-cent an hour raise, to which Cross responded that when he could afford to give a raise he would give it, but at that time he could not afford it. Coley inquired why Cross could not grant the raise.[8] It may be inferred that some, but not all, of the employees returned to work.

Nellie Sample, Edith Mitchell and Glennie Badger Coley, discriminatees herein, together with William Black and Nellie Chavis left the Respondent's plant and went to a State Labor Board Office. The group next contacted a Mr. Barbour, identified as president of the Union. The group was advised that they should return to work. The group returned to Respondent's plant and had a conference with Cross and Murphy at about 4 p.m. Black, as spokesman for the group, explained that they were sorry they had walked out and asserted that they wished to return to work.[9] It is undisputed that all of the employees reported for work on Monday, September 23, 1963.

On Sunday, September 22, 1963, Mitchell, Chavis, Black, Sample and Coley went to Greensboro and talked to Simmons and another union representative. While they were there they signed union authorization cards and were given cards to solicit signatures from other employees. Sample, Mitchell and Coley, each credibly testified that thereafter they circulated the cards and obtained signatures at the plant.

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7 Identified as Nellie Gray McLain in Respondent's answer.

8 Cross acknowledged that he was advised that the group wanted a raise and that he responded that he was not able to give them a raise, but would when he could. Cross however could not specify any particular individual to whom he spoke at that time.

9 Cross acknowledged meeting with five employees in the late afternoon, but was unable to identify the participants.

Interference, Restraint and Coercion

Corine Hinton was employed by Respondent in 1962. Her particular job was stuffing chickens. It may be inferred that she was still employed at the time of her testimony, March 2, 1964. Hinton credibly testified that on October 2, 1963, she was sent to the office to talk to Mrs. Cross. Mrs. Cross opened the conversation by asking Hinton "what are you trying to do to us?" Hinton responded "nothing, Mrs. Cross." Mrs. Cross then advised Hinton that she had been advised that Hinton was the leader of the Union. Hinton denied the assertion. Mrs. Cross then stated, "Well, one thing about it, the Union ain't going to come in down here, before the Union comes in down here, we will close this plant, and I can sit down on the green grass and make my living because, Corine, I don't have no children."

Hinton related that, during her conversation with Mrs. Cross, Mr. Cross asked her who the two girls were that she had taken out to talk to Sample the day previous. Hinton related that on October 1, during a break period, she had taken two girls, who were new employees, out to talk to Sample, and have them sign union cards.[10] Cross then advised Hinton he had the names of the two girls.

Hinton related that during the conversation on October 2, Mr. Cross asked her if there was going to be a union meeting that night. Hinton denied knowledge of such a meeting. However, Hinton testified that there was a meeting that evening at Edith Mitchell's home.[11]

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10 Sample related that while she was talking to two girls, and having them sign union cards, after Hinton had brought the two girls to her, she saw Mr. Cross passing by and observing what they were doing.

11 On cross-examination Hinton became confused and placed the time of these events as November 2, 1963. Since all of the events occurred at the same time and were related to the activity of Sample, during Sample's employment which was terminated on October 3, and since the employees did meet at Mitchell's home on October 2, I find that Hinton's initial testimony that the events occurred on October 2 was more accurate than her later testimony that it was November 2.

Mrs. Cross, while present at the hearing, was not called as a witness. Mr. Cross appeared as a witness and testified prior to Hinton. He was not thereafter recalled and did not deny Hinton's assertions, which I have found credible.

Emma Mae Roberson was still employed by Respondent when she testified on March 2, 1964. Roberson related that she had a conversation with Mrs. Cross during the week of October 14 to October 18, "a week after Edith Mitchell was fired." Roberson was advised that she was to go to the office to talk to Mrs. Cross. Mrs. Cross advised Roberson that Mrs. Cross had heard that Roberson was the leader of the Union. Roberson denied that she was the leader of the Union. Thereupon, Mrs. Cross inquired if she knew who the union leader was. Roberson denied knowledge. Mrs. Cross advised Roberson that she had fired "three of them" identifying Mary Jean Chavis and Sample. Mary Jean Chavis was identified as a sister of Sample. Mrs. Cross advised Roberson that she intended to keep on firing "until she got down to the bottom of it."

Discharge of Nellie Sample—October 3, 1963

It is undisputed that Nellie Sample was employed by Respondent in the summer of 1962 and was discharged on October 3, 1963. Her assignment, while working, was stuffing chickens.

Sample related the events immediately preceding her discharge. On the morning of October 3, she was working alongside an employee named Betsy Green. The two were talking when Mr. Cross came up and told Green to move to a place further down the line. Green looked at him and smiled and Cross said, "Girl, there is no use to laugh, move on down the line." Thereupon, Green moved down the line. Sample called over to Green and asked her if she had been laughing. Green responded she had not been laughing. Mrs. Cross, in the words of Sample, "walked up to me and asked me what it was to me." Mrs. Cross then told Sample to move down the line. Sample looked at Mrs. Cross but did not say anything. Mrs. Cross then said, "If you can't do what I tell you to, take off." Sample asked Mrs. Cross if she was fired. Mrs. Cross responded, "Yes, you are fired." Staten, another employee who had accompanied

Mrs. Cross, took the stabber out of Sample's hand and started doing the work Sample had been doing. Sample testified that this was done by Staten with no instructions from Mrs. Cross. Sample then turned to Mr. Cross and asked him if she was fired. Cross responded, "No you are not fired, you just don't do your work right." Shortly thereafter, Mrs. Cross, upon request, gave Sample her pay. Inferentially, during break time, Sample asked Cross again if she was fired and he advised her that she did not do her work right. She then advised Cross that if she was not fired she would return to work after break time. Cross responded that he would not put her back to work. Sample denied being sent home the prior day either for talking or for leaving the line. She acknowledged that Foreman Murphy, on either October 1 or October 2, sent her home 15 minutes before the end of the workday because she did not move down the line when he told her to do so. She acknowledged advising Murphy that she was working in the same place in which she had always worked. She denied advising Murphy that she was not going to move, but acknowledged telling him that she was standing in the same place that she had always stood. Sample denied being warned on several occasions about staying in line.

Sample's testimony relative to the circumstances of her discharge stands undisputed. Sample denied that any reference was made to company rules by either Mr. Cross or Mrs. Cross at the time of her discharge.

Discharge of Edith Mitchell—October 9, 1963

Edith Mitchell was hired by Respondent in September 1962. Her assignment was pulling guts and cutting buttholes. She was discharged October 9, 1963.

Mitchell related that on Tuesday, September 24, during a break period, she was obtaining the signature of an employee named Johnson on a union card when Foreman Murphy passed by and observed her activity.

Mitchell related the circumstances under which she was discharged. Mitchell asserted that she had changed places with a new girl, on October 9, because the new girl's hands were sore, and the new girl was unable to keep up with her work. About 10 minutes after work started Cross came to her work station and asked why she was there. Mitchell explained to Cross that the other girl's hands were sore and she could not keep up and was leaving too many chickens to be pulled. Cross told Mitchell to move. She asked Cross to wait and he made a whistling sound and motioned with his thumb. Mitchell told Cross she was not a dog and he did not have to whistle at her. Cross called Annie Belle Wilson and told her to work where Mitchell was standing. Mitchell stooped to pick up her gloves and cloth, in order to comply with Cross' direction, and at that time Cross told her, "That's all." Mitchell then inquired if she could get her pay and Cross advised her to come back on Friday. Mitchell insisted on obtaining her pay and Cross directed her to go to the office.

Mitchell acknowledged that on the day of her discharge her assignment was to pull guts, that chickens were getting by without guts being pulled, and that it was for this reason that Cross told her to change positions. However, Mitchell denied that Cross explained that he was trying to get the line straightened out. Mitchell also denied that Cross instructed her to change places with the learner, who was also pulling guts. Mitchell denied advising Cross that she would not change position as instructed, asserting that she advised him that she had to watch every chicken and could not watch every one of them. Mitchell asserted that she did not have time to pick up her gloves when Cross advised her "that's all."[12]

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12 Mitchell denied being given a copy of the Rules of Respondent when she was first employed. She asserted the only rule she was advised of was talking too much, while working on the line. She acknowledged she was advised of this by Foreman Murphy the day she was hired, and warned about talking too loud three or four times during her employment. She denied being told about talking, by Murphy, in the last week of her employment. I credit her denial. Mitchell denied having refused to obey

Mitchell related that, while she was waiting outside the office for her pay, Mr. Cross, Mrs. Cross, and Mr. Cross' sister were in the office. When Mr. Cross' sister opened the door to give Mitchell her pay Mitchell overheard Mrs. Cross say, "There is three and two more to go." Mitchell testified that prior to October 9, Sample and Black had been severed from employment, Nellie Chavis and Coley were still employed.

Mitchell related that she had organized two union meetings, the first on September 26 at the home of Chavis, and the second, on October 2, at Mitchell's home.

Discharge of Glennie Badger Coley—October 29, 1963

Coley was initially employed by Respondent on July 15, 1962, and was discharged on October 29, 1963. Her principal assignment was cutting oil bags.

Coley related a conversation with Foreman Murphy, on an unspecified date during the effort to obtain employee signatures. Murphy told Coley the employees did not know what they were doing. Coley responded they were trying to get "the damn union cards signed."

Coley related that on October 29, she started at her usual assignment of cutting oil bags. About 30 minutes later Foreman Murphy sent for her to come up front to cut bong holes. She continued on this assignment about 15 to 20 minutes when Murphy assigned her to pulling craws. A few minutes later Murphy sent her to cut gizzards. This was the first day on which she had been assigned to four different jobs in one morning. The first break period commenced about 9:30 a.m. and was supposed to last 30 minutes. Coley related that the neck cutter broke and they were

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Cross when he told her to move. I credit her denial. Mitchell denied having been moved to a different work station earlier the same morning. Mitchell denied that Murphy had moved her from one work station to another the prior day because she was talking or playing. Foreman Murphy did not appear as a witness. Cross did not testify relative to the circumstances leading up to the discharge of Mitchell.

given an extra break period until it was fixed. Work resumed at 11 a.m. Thereafter about 1 p.m. she requested Staten to replace her so she could go to the bathroom. Staten responded he did not have time. A few minutes later she asked Luther Johnson to replace her and he declined. Coley's undisputed testimony was that among the duties of Johnson and Staten, identified as handymen, was the duty of relieving employees on the line, when it became essential for an employee to go to the bathroom. Coley asserted that at 1:50 p.m. her line stopped, because the chickens had piled up on the second line. She left her work station to go to the bathroom and encountered Foreman Murphy and Mr. Cross. Murphy asked her who was working in her place and she responded that no one was, that there were no chickens over there. Murphy advised her "well, damn, go back anyway." She advised Murphy that she had to go to the bathroom and continued toward the bathroom. Murphy then told her "damn, if you go, damn, take it with you." Upon her return from the bathroom she inquired of Murphy if his statement meant that he was firing her. Murphy responded "hell no" she then asked him what he meant by stating that if she went to the bathroom she should take it with her, because he knew she could not take the bathroom with her. Murphy then advised her that he was talking about her job and that he was firing her. Upon her inquiry about her pay Murphy requested Cross to pay her off. She proceeded to the office. While she was waiting for her pay, Cross advised her that Murphy had not fired her. Coley repeated what had been said by Murphy, with Cross standing nearby, and Coley was then given her pay by Cross.

Coley denied seeing Respondent's Rules posted on the bulletin board, a fact established by other witnesses. However, Coley admitted seeing a notice posted on a window near the break room which advised employees that any employee who left the line without permission, to go to the bathroom, would be discharged. Coley saw this sign about a week after the walkout of September 20.

It was stipulated that Respondent's records reflected some 500 personnel entries between August 1962 and November 1963. In this period only four persons were purportedly discharged for failure to obey Respondent's orders: Sample, Mitchell, Coley and Victor Hines, the latter on October 18, 1963. All others were separations because the employee had another job, except seven: three did not like the work; two did not wish to work regularly; one for fighting on the job; and one deceased.

Respondent's Defense

Respondent, in its answer, asserted that the three named employees were discharged for violation of company rules identified as No. 4, 6 and 10. Respondent asserted that the employees were warned on several occasions that they were violating rules, by leaving their places of work during working hours, continuing to talk on the job during working hours at places other than their work station, and that they were warned that they would be discharged if they continued leaving their work and engaging in conversations in the plant other than at their places of work. Respondent has introduced no evidence to support these assertions.

In its brief Respondent urges that Nellie Sample's testimony establishes that she was discharged because she refused to move down the line in accordance with instructions from her supervisor. Respondent urges that Mitchell was told by Mr. Cross to change places "on several occasions" and refused to do so and was fired for that reason. Respondent urges that Coley went to the bathroom, leaving the line without permission when she was aware of the fact that an employee would be discharged for such conduct. Respondent characterizes Coley's conduct as a flagrant violation of the rules.

Concluding Findings

It is undisputed that on Friday, September 20, 1963, there was a work stoppage during which a substantial number of

Respondent's employees sought to obtain a 15-cent an hour wage increase. Being unsatisfied with the explanation given by Charles H. Cross, Respondent, five employees, including Sample, Mitchell and Coley left the plant to seek advice relative to such a wage increase. It may reasonably be inferred that the wage incease sought was related in some nebulous manner to the minimum wage law. Having been advised so to do, the five returned to Respondent's plant, late the same afternoon, and had a conference with Cross and Foreman Murphy, seeking reinstatement. They were advised to report on Monday.

On Sunday, September 22, the same five went to Greensboro, joined the Union and were given authorization cards for the other employees to sign. It is patent that the three dischargees circulated cards, in the plant, thereafter and Sample and Mitchell were observed by Cross and Foreman Murphy obtaining signatures. I have found that Coley's activity was known to Murphy.

I have found, *supra,* that, on October 2, Mrs. Charles H. Cross interrogated Hinton relative to her activity in the union drive and advised her that if the Union came in they would close the plant. It is well established that such interrogation, and such a threat to close the plant, is, in each instance, conduct constituting interference, restraint, and coercion and violative of the provision of Section 8(a)(1) of the Act. I find accordingly.

I have found, *supra,* that, on October 2, Charles H. Cross interrogated Hinton relative to the identity of two employees he saw signing union cards, the day previous, also, relative to Hinton's knowledge of a union meeting which was scheduled for the same evening. It is well established that such interrogation constitutes interference, restraint, and coercion and is violative of the provisions of Section 8(a)(1) of the Act. I so find.

I have found, *supra,* that after the discharge of Mitchell,

on October 9, 1963, Mrs. Charles H. Cross, interrogated Roberson, inquiring as to whether she was the leader of the Union, also if she knew the identity of the leader of the Union. I have also found that Mrs. Cross at that time advised Roberson that she had fired three employees for union activity, and that she intended to continue firing until she got "to the bottom of it." I find the questioning of Roberson constituted interrogation and that Mrs. Cross' statements relative to firing employees for union activity constituted threats. Said interrogation and threats, each, constituted interference, restraint, and coercion and were violative of the provisions of Section 8(a)(1) of the Act. I so find.

The evidence establishes the abruptness of the discharge of Sample. The timing of the discharge was 1 day after the interrogation of Hinton, by Respondent and Mrs. Charles H. Cross, and 2 days after Sample was observed by Cross obtaining signatures on union cards. The antiunion animus of Respondent is established by the conduct and statements of the Respondent and Mrs. Charles H. Cross on the day preceding the discharge. While it may be urged that Sample did not respond with alacrity upon Mrs. Cross' direction for her to move, it has frequently been stated that the existence of a reason for a discharge is no defense if it was not "the moving cause."[13] The testimony of Roberson that Mrs. Cross advised her that Sample had been fired for union activity stands undenied.

The discharge of Mitchell, on October 9, occurred under circumstances similar to those existing at the time of the discharge of Sample. It was abrupt, without warning, in an atmosphere of animus and stands without explanation by the Respondent.

In numerous cases the Board has found a discharge discriminatorily motivated by reason of the unconvincing character of the reasons adduced to support the discharge,

13 *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 460.

including the timing of the discharge.[14] In this instance there is no testimony by Charles H. Cross or Mrs. Charles H. Cross relative to the circumstances which caused the discharges. Respondent's records reflect no other discharges under similar circumstances in the preceding 14 months.

The discharge of Coley is not without apparent reason. It is evident from Coley's testimony that she sought relief, unsuccessfully, in order to go to the bathroom. I have found that she was aware of Respondent's rule that she was not to leave her work station, for that purpose, without obtaining relief. On the basis of demeanor, I find Coley a credible witness. I have found that the line on which she was working was not in operation at the time she left her work station. I have also found that she disregarded Foreman Murphy's direction for her to return to her work station, and proceeded to the bathroom. It is thus patent that she was not only violating a company rule but was also violating an express order of Foreman Murphy. However, in contrast, the record establishes that three of the five who had sought outside aid on September 20, and thereafter brought the union movement into the plant, commencing September 23, had been, in the interim, severed from Respondent's employment. In addition, Mrs. Cross had expressed Respondent's intent to continue firing those active in the union movement until she got to the bottom of it. The resultant question is the motivation for the discharge.

There are numerous cases in which the Board and Courts have held that membership in, or activity on behalf of, a union does not immunize employees from discharge. Similarly, it is not the function of the Board to determine the reasonableness or unreasonableness of Respondent's conduct in discharging employees. The sole question to be resolved is whether Respondent's purported reason for dis-

14 *Pacemaker Corporation*, 120 NLRB 987, 991; *United Fireworks Mfg., Co.*, 118 NLRB 883, 888.

charge was, in fact, pretextuous, and whether the discharge, in fact, was discriminatorily motivated.

Speaking for the court, Medina, C.J. has said: "The unexplained coincidence of time with respect to the principal events was really no coincidence at all, but rather part of a deliberate effort by the management to scotch the lawful measures of the employees before they had progressed too far toward fruition . . . . If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation of the . . . Act." *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F.2d 725 (C.A. 2).

The abruptness of a discharge, and its timing, have been found to be persuasive as to motivation. *N.L.R.B. v. Montgomery Ward & Company*, 214 F.2d 497, 502 (C.A. 2); *N.L.R.B. v. Southern Desk Co.*, 246 F.2d 53, 54 (C.A. 4).

In view of the above facts, and upon the entire record as a whole, I find that Respondent's purported reasons for the discharges of Nellie Sample, October 3, 1963, Edith Mitchell, October 9, 1963, and Glennie Badger Coley, October 29, 1963, were pretextuous, and that the real reason and "moving cause" was the known union and concerted activities of said employees, and said discharges constituted discrimination with respect to the hire and tenure of employment of said employees to discourage membership in the Union and were in violation of Section 8(a)(3) and (1) of the Act.

In arriving at my findings of credibility herein, I have considered all of the testimony, the demeanor of the witnesses, the interest of each witness in the outcome of the litigation, or lack of such interest, candor or lack thereof, and the failure to refute testimony.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the Respondent's operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several States, and, such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged, and is engaging, in certain unfair labor practices, it will be recommended that he cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Nellie Sample, on October 3, 1963, Edith Mitchell, on October 9, 1963, and Glennie Badger Coley, on October 29, 1963, because of their union and concerted activities, I recommend that Respondent offer to each of them immediate and full reinstatement to the former or substantially equivalent position of each without prejudice to their seniority and other rights and privileges and make each of them whole for any loss of pay each may have suffered by reason of Respondent's discrimination against each, by payment to each of a sum of money equal to that which each would normally have earned as wages from the date of the discharge of each, to the date when, pursuant to the recommendations herein contained, Respondent shall offer each of them reinstatement, less the net earnings of each during said period. Said backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co., Inc.*, 138 NLRB 716.

It is also recommended that Respondent be ordered to make available to the Board, upon request, payroll and other records to facilitate checking of the amount of earnings due.

In view of the nature of the unfair labor practices committed, the commission of similar and other unfair labor practices reasonably may be anticipated. I shall therefore recommend that the Respondent be ordered to cease and desist from in any manner infringing upon rights guaranteed to its employees by Section 7 of the Act.

Upon the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is engaged in activities affecting commerce within the meaning of Section 2(7) of the Act.

2. Local 535, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct set forth in the Section entitled "Interference, Restraint and Coercion," to the extent herein found, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminating with respect to the hire and tenure of employment of Nellie Sample, Edith Mitchell, and Glennie Badger Coley, by discriminatorily discharging them, as found *supra,* thereby discouraging the free exercise of the rights guaranteed by Section 7 of the Act, and discouraging membership in and activities for the above-named labor organization, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor

practices affecting commerce within the meaning of Section 2(7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the Act, I recommend that Charles H. Cross, d/b/a Cross Poultry Company, his agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, Local 525, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, or any other labor organization of his employees, by discharging, and thereafter failing and refusing to reinstate, employees, or in any other manner discriminating against them in regard to their hire and tenure of employment or condition of employment.

(b) Threatening economic retaliation if any employee engages in organizational activities.

(c) Interrogating employees in the manner violative of Section 8(a)(1) of the Act.

(d) In any other manner interfering with, restraining or coercing his employees, in the exercise of the right of self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to Nellie Sample, Edith Mitchell, and Glennie Badger Coley, immediate and full reinstatement to the former or substantially equivalent position of each without

prejudice to their seniority or other rights and privileges previously enjoyed, and make each whole for any loss of pay each may have suffered by reason of Respondent's discrimination against each, in accordance with the Recommendations set forth in "The remedy" herein.

(b) Preserve and make available to the Board, or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amounts of backpay due and the right of employment under the terms of the Recommendations herein.

(c) Post at his place of business in Raleigh, North Carolina, copies of the notice attached hereto marked "Appendix."[15] Copies of said notice to be furnished by the Regional Director for the Eleventh Region, shall, after being duly signed by the Respondent, be posted by Respondent, immediately upon receipt thereof, and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Eleventh Region, in writing, within 20 days from the date of receipt of this Trial Examiner's Decision, what steps Respondent has taken to comply with the foregoing Recommendations.

It is further recommended that unless, within 20 days from the date of the receipt of the Trial Examiner's Decision, the Respondent shall notify the said Regional Director,

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[15] In the event that these Recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS ENFORCING AN ORDER," will be substituted for the words "A DECISION AND ORDER."

in writing, that it will comply with the foregoing Recommendations,[16] the National Labor Relations Board issue and Order requiring Respondent to take the aforesaid action.

Dated at Washington, D. C., June 19, 1964.

LEO F. LIGHTNER, Trial Examiner.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in, or activities on behalf of, LOCAL 525, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization of our employees, by discharging, or failing or refusing to reinstate, employees, or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten economic retaliation if any employee engages in organizational activities.

WE WILL NOT interrogate any employee in a manner violative of the provisions of Section 8(a)(1) of the Act.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to join or assist the aforementioned or any other labor organization, to bargain collectively through representatives of their own choos-

[16] In the event these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith."

ing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer to Nellie Sample, Edith Mitchell, and Glennie Badger Coley, immediate and full reinstatement to the former or substantially equivalent position of each without prejudice to their seniority and other rights and privileges, and make each of them whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become, to remain, or to refrain from becoming or remaining, members of a labor organization of their own choosing.

C. H. CROSS, d/b/a

CROSS POULTRY COMPANY

(employer)

Dated---------- By----------

(Representative) (Title)

NOTE:—We will notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 1831 Nissen Building, Winston-Salem, North Carolina 27101 (Tel. No. 724-8356), if they have any questions concerning this notice or compliance with its provisions.

STIPULATION OF FACTS

Re: Cross Poultry Company

Cases Nos. 11-CA-2274

11-CA-2306

It is hereby stipulated between Counsel for General Counsel and Respondent in the above-styled case that:

(1) During the year ending December 31, 1963, Respondent, a nonretail individual proprietorship engaged in the production of poultry products, produced and sold poultry products of a value in excess of $300,000 to North State Provision Company, Inc., at Ahoskie, North Carolina.

(2) During the year ending December 31, 1963, Respondent produced and sold poultry products of a value in excess of $50,000 to Colonial Stores, Incorporated, at its Raleigh, North Carolina, division.

(3) North State Provision Company, Inc., is a corporation with its principal office and place of business at Ahoskie, North Carolina, where it is engaged in the wholesale business of distributing and selling beef, veal, pork, poultry and other products.

(4) During the year ending December 31, 1963, North State Provision Company, Inc., sold and shipped products of a value in excess of $50,000 from its Ahoskie, North Carolina, place of business to points outside the State of North Carolina.

(5) Colonial Stores, Incorporated, is a Virginia corporation engaged in the operation of market type stores retailing groceries, meat, produce, poultry and other products. It has stores and other facilities in Virginia, North Carolina, and other states.

(6) During the year ending December 31, 1963, gross sales of Colonial Stores, Incorporated, were in excess of $10,000,000 and during the same period of time, its sales

through its Raleigh, North Carolina Division facility were in excess of $500,000.

(7) No poultry produced by Respondent is sold outside the State of North Carolina.

(s) ----------
Counsel for General Counsel

(s) ----------
Attorney for Respondent

TRIAL STIPULATION

* * * * * *

(133) (Mr. Brooks) It is stipulated by and between the parties that such poultry produced by the Respondent could not be lawfully sold outside the State of North Carolina in that said poultry was not federally inspected, as provided under Title 21, Chapter 10 of the U.S. Code Annotated; and could not lawfully be resold outside the State of North Carolina as the poultry was not federally inspected as provided under (134) Title 21, Chapter 10 of the U. S. Code Annotated.

(Mr. Williamson) Agreed.

(Mr. Pullen) Agreed.

(Mr. Simmons) Agreed.

(Trial Examiner) Let the record indicate that the stipulation is accepted.

* * * * * *

ORDER OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT STAYING THE MANDATE

Upon the petition of the respondent, by its counsel, and for cause shown,

It is ordered that the issuance of a certified copy of the decree of this Court be, and it is hereby, stayed pending

application of the respondent in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed within 60 days from this day.

June 28, 1965.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit.

FILED
JUN. 28, 1965
MAURICE S. DEAN
CLERK

A LAYMAN'S GUIDE TO BASIC LAW UNDER THE NATIONAL LABOR RELATIONS ACT, by Stuart Rothman, General Counsel, National Labor Relations Board, October 17, 1962, pp. 40, 41.

> "Although the National Labor Relations Board could exercise its powers to enforce the Act in all cases involving enterprises whose operations affect commerce, the Board does not act in all such cases. In its discretion it limits the exercise of its power to cases involving enterprises whose effect on commerce is substantial. The Board's requirements for exercising its power or jurisdiction are called 'jurisdictional standards'. These standards are based on the yearly amount of business done by the enterprise, or on the yearly amount of its sales or of its purchases. They are stated in terms of total dollar volume of business and are different for different kinds of enterprises. The Board's standards in effect on January 1, 1962, are as follows:
>
> 1. *Nonretail business*: Sales of goods to consumers in other States directly, or indirectly through others (called

outflow), of at least $50,000 per year, or purchases of goods from suppliers in other States directly, or indirectly through others (called inflow), of at least $50,000 per year.

2. *Office buildings*: Total annual income of at least $100,000 of which $25,000 or more is paid by other organizations which meet any of the standards except standard 1 (nonretail).

3. *Retail enterprises*: At least $500,000 total annual volume of business.

4. *Public utilities*: At least $250,000 total annual volume of business.

5. *Newspapers*: At least $200,000 total annual volume of business.

6. *Radio, telegraph, television, and telephone businesses*: At least $100,000 total annual volume of business.

7. *Hotels and motels*: At least $500,000 total annual volume of business. (If the hotel or motel is one where 75 percent or more of its guests remain 1 month or more, it is considered permanent or residential and the Board will not exercise jurisdiction.)

8. *Taxicab companies*: At least $500,000 total annual volume business.

9. *Transit systems*: At least $250,000 total annual volume of business.

10. *Transportation enterprises, links and channels of interstate commerce*: At least $50,000 total annual income from furnishing interstate transportation services or performing services valued at $50,000 or more for enterprises that meet any of the standards except the indirect outflow and indirect inflow standards established for nonretail businesses.

11. *Associations*: Regarded as a single employer in that the annual business of all members is totaled to determine whether any of the standards apply.

In addition, the Board exercises jurisdiction over all enterprises that affect commerce when their operations have a substantial impact on national defense. Also, all businesses in the District of Columbia come under the jurisdiction of the Board.

Ordinarily if an enterprise does the total annual volume of business listed in the standard it will necessarily be engaged in activities that 'affect' commerce. The Board must find, however, based on evidence, that the enterprise does in fact 'affect' commerce."

PERTINENT STATUTES

"21 U. S. C. § 453. Definitions

For purposes of this chapter—

(a) The term 'commerce' means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia."

"21 U. S. C. § 458. Prohibited acts

The following acts or the causing thereof are prohibited:

(a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this chapter."

"28 U. S. C. § 1254. Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

"29 U. S. C. § 152. Definitions

When used in this subchapter —

. . .

(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

. . ."

"29 U. S. C. § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ."

"29 U. S. C. § 160. Prevention of unfair labor practices

* * *

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Art. I, Sec. 8, cl. 3, U. S. Constitution:

"§ 8. The congress shall have power

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 491

C. H. CROSS d/b/a CROSS POULTRY COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19-21) is reported at 346 F. 2d 165. The Board's Decision and Order (Pet. 22-47) are reported at 148 NLRB No. 90.

JURISDICTION

The judgment and decree of the court of appeals (Pet. 21-22) were entered on May 31, 1965. The pe-

tition for a writ of certiorari was filed on August 24, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the operation of a wholly intrastate business that sells its products to firms engaged in interstate commerce "affects commerce" within the meaning of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 53-54 of the petition for certiorari.

STATEMENT

The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees concerning their union activities, by threatening to discharge them for those activities, and by threatening to close the plant if the Union [1] was selected as their representative. The Board further found that petitioner violated Sections 8(a)(3) and (1) of the Act by discharging two employees because of their union activities. The Board ordered petitioner to cease and desist from the unfair labor practices found, and to reinstate with

[1] Local 525, Amalgamated Meat Cutters & Butcher Workmen of North Carolina, AFL-CIO.

back pay the two employees he had discriminated against (Pet. 22-24, 31-45). The only issue raised here is whether the Board had jurisdiction over petitioner. The facts pertinent to this issue are as follows:

Petitioner, C. H. Cross, maintains a plant at Raleigh, North Carolina, for processing poultry products. In the year ending December 31, 1963, petitioner produced, sold, and distributed poultry products valued at more than $500,000. Although no poultry products produced by petitioner are sold outside North Carolina, petitioner's customers do make substantial out-of-state sales of other products. During the above period, petitioner sold poultry products valued at more than $300,000 to North State Provision Company, Inc. (a wholesaler of poultry, beef, veal, pork, and other products), which, during the same period, sold and shipped products valued at more than $50,000 to points outside the State of North Carolina. Also during this period, petitioner sold products valued at more than $50,000 to Colonial Stores, Inc., which maintains retail stores in Virginia, North Carolina, and other States; in the year ending December 31, 1963, Colonial Stores' gross sales exceeded $10,000,000 (Pet. 25, 48-49).

Based on these facts, the Board found that petitioner's operations affected commerce within the meaning of Section 2(7) of the Act, and that they met the Board's self-imposed standards for the exercise of its statutory jurisdiction (Pet. 23, n. 2, 26-28). The court of appeals sustained the Board's findings and enforced its order (Pet. 19-21).

ARGUMENT

Petitioner's basic contention is that, since his products were produced within the State of North Carolina and sold only to customers within that State, and the customers could not ship them out of the State because they were not marked in accordance with the federal poultry inspection law, there is no basis for finding that his operations affect commerce within the meaning of the Act. This contention is patently without merit. As the Board pointed out (Pet. 23, n. 2):

> Though [petitioner's] products may never enter the stream of interstate commerce they nevertheless affect such commerce through their competition with federally inspected poultry which crosses State lines, see *Wickard* v. *Filburn*, 317 U.S. 111, and because a labor dispute at [petitioner's] plant would tend to burden the operations of its customers who are engaged in commerce by cutting off a source of supply. See *Reliance Fuel Oil Corp.* v. *National Labor Relations Board*, 371 U.S. 224.

Also without merit is petitioner's further contention that the Board's jurisdictional finding was defective because the Board failed to establish that a work stoppage at his operation would, in fact, burden interstate commerce. As the court below noted (Pet. 20-21), such a contention was expressly rejected in *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224. " 'Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately be-

fore the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.' *Polish Alliance* v. *Labor Board*, 322 U.S. [643], at 648." 371 U.S. at 226.[2]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

National Labor Relations Board.

SEPTEMBER 1965.

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[2] *National Labor Relations Board* v. *Benevento*, 297 F. 2d 873 (C.A. 1), on which petitioner relies, was decided prior to this Court's decision in *Reliance, supra.* See the First Circuit's second decision in *Benevento*, 316 F. 2d 224, where, after this Court's decision in *Reliance*, the jurisdiction of the Board was sustained.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 786444 169